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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 273

HARRY J. BRIGGS, JR., ET AL.,

Appellants,

vs.

R. W. ELLIOTT, CHAIRMAN, J. D. CARSON AND GEORGE KENNEDY, MEMBERS OF THE BOARD OF SCHOOL DISTRICT No. 22, CLARENDON COUNTY, S. C.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

S. E. ROGERS,
ROBERT McC. FIGG, JR.,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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Appellants,

versus

R. W. ELLIOTT, CHAIRMAN, ET AL.,

Appellees

STATEMENT OF APPELLEES AS TO JURISDICTION AND MOTIONS TO DISMISS AND AFFIRM

Statement of Appellees as to Jurisdiction

Under Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, as amended, the appellees file this statement as to matters making against the jurisdiction of the Court asserted by the appellants.

This matter had its genesis in a petition filed by the appellants, or most of them, with the Board of Trustees of School District No. 22 of Clarendon County, South Carolina, and other school authorities of the county, alleging that the educational facilities furnished the infants and other qualified Negro pupils residing in the school district and attending the elementary, grammar and high school grades therein were not equal to those furnished to white pupils of the district, and praying that discrimination

against them cease, and that educational advantages and facilities equal in all respects to those provided for white pupils be made available to them. (Exhibit A of the Answer.)

The instant action was commenced subsequent to a denial of the petition by the Board of Trustees, which was based on a finding that the facilities afforded to the white and Negro children of the district, though separate, were substantially equal. (Exhibit B of the Answer.)

This action is for a declaratory judgment declaring the rights and legal relations of the parties, "in order that such declaration shall have the force and effect of a final judgment or decree." The complaint, paragraph 11, alleges that the public schools of Clarendon County set apart for white students and from which all Negro students are excluded are superior in plant, equipment, curricula, and in other material respects to the schools set apart for Negro students, and the appellants predicate their claim for relief on two questions alleged to be in actual controversy between the parties, namely, (1) that the constitutional and statutory provisions of the State of South Carolina providing for separate schools for the white and colored races are unconstitutional *per se* under the Fourteenth Amendment, and (2) that the appellees have not furnished to the appellants separate educational opportunities, advantages, and facilities which are equal to those afforded and available to white children of public school age similarly situated, and that this constitutes a denial of equal protection of the laws under the Fourteenth Amendment.

The cause was tried before a Special District Court of three Judges convened under Title 28, United States Code, Sections 2281 and 2284. At the trial the appellees, with leave of the Court, filed an amendment to their answer admitting on the record that the educational facilities, equip-

ment, curricula, and opportunities afforded in the school district for colored pupils of elementary and secondary grades were not substantially equal to those afforded in the district for white pupils, and stating that the finding of substantial equality by the Board of Trustees in denying the petition was arrived at by a process of addition and subtraction of advantages afforded to one race balanced against those afforded to the other, a method of determining equivalency which was subsequently rejected by the Court of Appeals for the Fourth Circuit in *Carter v. School Board of Arlington County*, 182 F. 2d 531.

The majority decision of the Three Judge Court overruled the contention of the Appellants that the constitutional and statutory provisions of the State requiring separate schools for the two races are unconstitutional *per se* under the Fourteenth Amendment, but found that the educational facilities, equipment, curricula and opportunities afforded in the school district for colored pupils are not substantially equal to those afforded for white pupils, and that this inequality violated the equal protection clause of the Fourteenth Amendment.

The Court's order provided that the appellees proceed at once to furnish to the appellants and other Negro pupils of said district educational facilities, equipment, curricula and opportunities equal to those furnished white pupils, that they make report to the Court within six months as to the action taken by them to carry out the orders, and that the cause is retained for further orders.

In connection with the exercise of its discretion, the Court had before it evidence that the white schools, provided for 277 enrolled pupils, could not physically receive and house either the 866 enrolled colored pupils or the total enrollment of 7,143 white and colored pupils in the district's schools; and had before it also the 1951 South Carolina

school legislation making substantial amounts of State funds available to the school districts of the State for the construction and equipment of school buildings, as well as the transportation of all pupils to and from schools, to provide ~~which a~~ 3% sales tax was enacted and the issuance of State bonds for the purpose was authorized.

The action to be taken by the appellees to comply with the order was not prescribed by the Court; this was left to the appellees to determine, with the question whether equality had been accomplished by them to be considered by the Court thereafter, and the controversy to be finally concluded one way or the other at that time by further order.

The cause is clearly still pending before the Special District Court of three Judges, and will be until there has been a final determination upon the question whether the appellees can furnish and have furnished equal educational facilities, equipment, curricula and opportunities to the appellants and other Negro pupils of the district. Until the Court has determined that separate equal educational facilities, equipment, curricula and opportunities can be and have been furnished, the question whether the constitutional and statutory provisions of the State challenged by the appellants are unconstitutional *per se* is not ripe for decision. *Sweatt* v. *Painter*, (1950) 339 U. S. 629, 631.

Motion to Dismiss Appeal

Come now the appellees, R. W. Elliott, Chairman, and others, and move the Court to dismiss the appeal herein upon the ground that the said appeal is premature and improvidently taken, in that the Court below has not finally determined the controversy between the parties, and that the question sought to be presented in this appeal is not ripe for decision prior to such final determination by the Court below, and its final action thereon.

In support of their motion to dismiss, the appellees respectfully show as follows:

The present appeal is purely interlocutory, and concerns the disposition of only one of the issues upon which the relief sought by the appellants was predicated. It is not from a final judgment in the cause, declaring the rights and legal relations of the parties, "in order that such declaration shall have the force and effect of a final judgment or decree," as prayed in the complaint.

It is well settled that this Court will not review by "piecemeal" or "in fragments." *Louisiana Nav. Co.* v. *Oyster Commission* (1912), 226 U. S. 99, 101. "To be appealable, the judgment must be, not only final, but complete." *Collins* v. *Miller* (1920), 252 U. S. 364, 370. To provide the jurisdiction for review by this Court, the decree sought to be reviewed must be final as to the whole subject matter of the proceedings and of all the causes of action involved. *Arnold* v. *United States* (1923), 263 U. S. 427; *Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.* (1916), 243 U. S. 251, 256; and *Republic Natural Gas Co.* v. *Okla.* (1948), 334 U. S. 62, 67 and 68.

The petition for appeal herein seeks to escape these established principles by limiting its appeal to an attack upon the validity *per se* of State action providing for separate schools under the Fourteenth Amendment, and by disregarding entirely the other phase of the case relating to the ability of the appellants to provide equality of facilities which is still pending without final determination in the lower Court. It might be that if this Court should reverse the lower Court on the constitutionality of separate schools *per se*, that would render academic the second phase of the cause which, in principle, was decided favorably to the appellants. But, should this Court uphold the unbroken authority of repeated State and Federal decisions and

recognize the legality of traditional and long standing Congressional and State legislation providing for separate schools, the other aspect of the case remains a live and finally undetermined issue until the lower Court ascertains and decides in its final judgment whether equality of facilities can be and have been furnished the petitioners.

The decision reserved is not a mere ministerial act; judicial judgment is involved in that determination. And the decision of the lower Court on that question must be reviewable under a proper state of facts by this Court. In other words, another review of this proceeding by appeal to this Court could thereupon arise. This cause presents the dilemma envisaged in *Collins* v. *Miller* (1920), 252 U. S. 364, 371, where the Court, in dismissing an appeal, said: "Only one branch of the case has been finally disposed of below; therefore none of it is ripe for review by this court."

It is respectfully submitted that the present appeal should be dismissed as premature and not from the final action of the lower Court, and that the determination of the constitutionality *vel non* of the State's constitutional and statutory provisions now sought to be presented in this appeal should await the final determination of the lower Court as to whether equality can be and has been provided by the appellees in compliance with the Court's order, and the final action of the lower Court in the light of its findings thereon. *Sweatt* v. *Painter* (1950), 339 U. S. 629, 631.

Motion to Affirm

Come now the appellees, R. W. Elliott, Chairman, and others, and, as an alternative to their motion to dismiss hereinbefore set forth, do move the Court to affirm the order appealed from on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, in view of the pre-

vious decisions of this Court concerning the validity under the Fourteenth Amendment of constitutional and statutory provisions of a State providing for separate public elementary and secondary schools for the white and colored races.

Missouri ex rel Gaines v. *Canada*, 305 U. S. 337.
Gong Lum v. *Rice*, 275 U. S. 78.
Berea College v. *Kentucky*, 211 U. S. 45.
Cumming v. *Board of Education*, 175 U. S. 528.
Plessy v. *Ferguson*, 163 U. S. 537.

In *Gong Lum* v. *Rice, supra*, the Supreme Court itself held that the question sought to be presented by this appeal "is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the Federal courts under the Federal Constitution," that the "right and power of the State to regulate the method of providing for the education of its youth at public expense is clear," and that the decision "is within the discretion of the State in regulating its public schools and does not conflict with the Fourteenth Amendment."

The power of a State to provide separate schools for the white and colored races was recognized and upheld prior to the adoption of the Fourteenth Amendment. *Roberts* v. *City of Boston*, 5 Cush. 198.

The decisions of State and Federal courts interpreting the Fourteenth Amendment within a few years of its proposal by the Congress and its ratification by the States all held that the equal protection clause was not intended to and did not limit State power to provide separate schools. *State ex rel Garnes* v. *McCann* (1871), 21 Oh. St. 198; *Cory* v. *Carter* (1874), 48 Ind. 327; *Ward* v. *Flood* (1874), 48 Cal. 36; *Bertonneau* v. *Board of Directors* (1878), 3 Woods 177, S. C. 3 Fed. Cas. 294, Case No. 1, 361; *People ex rel*

King v. *Gallagher* (1883), 93 N. Y. 438. These cases and others were cited with approval of their interpretation of the Amendment in *Plessy* v. *Ferguson, supra*, and in *Gong Lum* v. *Rice, supra*.

The same Congress which wrote and proposed the Fourteenth Amendment also enacted legislation providing for separate schools in the District of Columbia, and that Congress and those immediately following it consistently refused to include measures to prohibit the establishment of separate schools by the States in the several Civil Rights Acts. Compare *Cory* v. *Carter, supra; Carr* v. *Corning*, 182 F. 2d 14; and, *inter alia*, 42nd Cong., 2nd Sess., pp. 3271, 3734, 3735; 43rd Cong., 2nd Sess., pp. 937, 1010, 1011.

The appellants conceive that "the rationale of the decisions in *Sweatt* v. *Painter*, 229 U. S. 629, and *McLaurin* v. *Board of Regents*, 339 U. S. 637" supports their contention. In the *Sweatt* case a separate law school was enjoined because it was found that equality could not in fact be thereby afforded, in view of considerations peculiar to the requirements of a legal education, while in the *McLaurin* case discriminatory regulations imposed on a Negro student in the enjoyment of the single and only facility furnished students by the State were enjoined. It is clear, therefore, that these cases represent an application of, and not a departure from, the long-standing interpretation of the equal protection clause.[1]

The meaning of the equal protection clause of the Fourteenth Amendment which the appellants seek to challenge

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[1] The obvious differences in the problems presented by graduate and professional schools and elementary and high schools were noticed in the opinion of the Court below, and referred to in the testimony. (R. 178, 179.) Appellants' counsel stated to the Court in his summation: "I grant there is a difference between university and college levels and elementary and high school levels. I agree there is a difference. Of course there is a difference." (R. 273.) As the Court below held, "as good education can be afforded in Negro schools as in white schools."

in this appeal has been long settled by judicial decisions, Federal and State, and by Congressional action, both in its consideration of the Civil Rights legislation enacted to enforce the Amendment and in its legislative regulation of the schools of the District of Columbia. There is not a single judicial decision or a single action of the Congress since the adoption of the Amendment which departs from that interpretation, or sustains the position of the appellants.

As held in the majority opinion of the Court below:

> "* * * when seventeen states and the Congress of the United States have for more than three quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stones, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. The Constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts."

It is respectfully submitted that the single question sought to be presented by the appeal is one which is conclusively settled against the contention of the appellants by the previous decisions of the Supreme Court, and that the motion of the appellees to affirm the order appealed *from* should be granted. Compare *Schnell* v. *Davis*, (1949) 336

U. S. 933; *Hodges* v. *Snyder*, (1923) 261 U. S. 600, 601; *City of Boston* v. *Jackson*, (1922) 260 U. S. 309, 314; *Chicago, I. R. & Pac. R. Co.* v. *Devine*, (1915) 239 U. S. 52, 54; *Missouri Pac. R. Co.* v. *Castle*, (1912) 224 U. S. 541, 544.

Respectfully submitted,

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